

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of

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Review of Foreign Ownership Policies for
Broadcast, Common Carrier and Aeronautical Radio
Licenses under Section 310(b)(4) of the
Communications Act, as amended.

Federal Communications Commission
Office of the Secretary

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GN Docket No. 15-236

REPLY COMMENTS
PART I

In 1742 in *Of The Liberty Of The Press*, David Hume wrote that "[n]othing is more apt to surprise a foreigner than the extreme liberty, which we enjoy in this country of communicating whatever we please to the public...." This Anglophone tradition of the freedom of the press arose out of the development of the printing press. The Harry Ransom Center at the University of Texas at Austin states that prior to the mid fifteenth century publication of the Gutenberg Bible only thirty thousand books had been produced. In the next half-century more than ten million books were printed by the more than two hundred European printing shops. The Bible, with estimated sales of five to six billion copies, remains the best selling book of all time and has been translated into more than twenty-five hundred languages.

As the Secretary of the Editorial Committee for the 1998 Plenipotentiary Conference of the International Telecommunication Union (ITU) at Minneapolis, I believe that it would be useful to limit an initial review of the FCC proposal to the six official languages of the United Nations and the "same footing" standard. See, e.g., Somini Sengupta, Nikki Haley Puts U.N. on Notice: US. Is 'Taking Names,' New York Times, Jan. 27, 2017. Two of the top ten best selling books of all time are in Chinese. The first is the *Quotations of Mao Zedong* developed over more than a decade from 1964 to 1976 and available in at least fourteen languages. The second is the *Xinhua Zidian* or the first modern, i.e. 1957, Chinese character dictionary. But PRC concessions in response to the FCC proposal are unlikely. See Heide B. Malhatra, China: Conquering America One Company at a Time, Epoch Times, June 21, 2013.

If the FCC proposal is not directed towards reciprocity with the PRC, could it be directed at Russia or the Russophone diaspora? Under current circumstances that also seems unlikely. While President Putin may feel that the end of the Soviet Union was the great tragedy of the 20th Century, this was, in part, as a result of the Stalinist purge of the kulaks that resulted in the decimation of Soviet agriculture. Mikhail Gorbachev, a former Soviet agricultural minister, was unable to save Soviet agriculture. While we have seen David Lean's masterpiece *Dr. Zhivago*, many broadcast viewers are likely unaware of the missed opportunity after the fall of the Berlin Wall for land reform in Russia under the kulak descendant Boris Yeltsin. Therefore, while

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President Trump's selection of Secretary of State Tillerson may turn out to be a brilliant refocus on the need for co-operation for the vast Russian lands east of the Urals and the FCC may be correct that there are potential benefits that U.S. communications expertise can bring to underpopulated Russian regions, there is no need for a rush to judgment here.

Perhaps the FCC intends to turn its attention to broadcasting in Arabic as the liturgical language of more than a billion Muslims? Arabic is inseparable from the more than thousand year old story of co-operation and conflict between the West and Islam and the third largest selling book in history available in well over a hundred languages. It is likely true that most of the books translated into Arabic involve religious texts and classical poetry, but the ten thousand books translated into Arabic in the past millenium are a small fraction of the 130 to 210 million published books. Indeed, it may only represent the number of books translated into Spanish in a single year. See, for example, World Press Review, Vol 49, No. 9 (2002) and Edward Nawotka, Bloomberg, Jan. 4, 2008. If the FCC proposal is related to the new \$2.5 trillion Saudi Aramco sovereign wealth fund, therefore it may also be premature. The Golden Age of Islam introduced a new and easier writing system that democratized the dissemination of information and resulted in advances in mathematics, physics, astronomy, biology, engineering and medicine. But one wonders whether the moment is ripe for a modern day effort similar to that between Charlemagne, the "Father of Europe" and the Abbasid caliph Harun al-Rashid. Reception dishes across Arabic neighborhoods in the Middle East and Europe suggest an opposition to the FCC proposal on the ground despite any possibilities offered by satellites in the air.

From an objective perspective the most fertile potential ground for the FCC proposal would most likely be in the Spanish speaking world. In many ways the Mexican government, somewhat surprisingly perhaps, has indicated that it may be more open to market liberalization for U.S. broadcasting than Canada. This, however, is a task for Secretaries Tillerson and Ross and USTR Lighthizer in the context of the renegotiation of the North American Free Trade Agreement (NAFTA). The Univision waiver signaled U.S. good faith. Any additional FCC unilateral trade concessions would be premature.

NAFTA, however, also brings up the U.S. relationship with French and the outdated cultural exemptions. The cultural exemptions as a practical matter, however, appear to be there to protect Anglophone Canadian media moguls rather than the francophone community.

Nevertheless, the francophone issue initially brings us to the traditional minimal role of the European Union in European broadcasting and the imminent Brexit of the United Kingdom from the EU. We know that all roads lead to Rome, but in the context of the transatlantic broadcasting relationship all roads seem to pass through tiny Luxembourg. Ringo Starr noted at his induction into the Rock and Roll Hall of Fame that he learned about our rock and roll greats from broadcasts from Luxembourg to Liverpool. If it is true that you can't always get what you want, but sometimes you get what you need, the vote for Brexit was a vote by the English middle and working classes for global peace and prosperity rather than a resumption of the Hundred Years War. The good people of Sherwood have read Alfred, Lord Tennyson's 1854 Charge of the Light Brigade and rejected Berlaymont's modern day direction that "theirs is not to reason why, theirs is but to do and die." Fog is rolling into the channel. The continent is being cut

off.

The European Union has made clear its initial opposition to the inclusion of audio-visual services in the Trans-Atlantic Trade and Investment Partnership (TTIP). See, e.g. Article 3-1 Scope Section 2 in Chapter III-Cross Border Supply of Services in the July 31, 2015 EU Trade in Services, Investment and E-Commerce proposal. But it is not even clear that the EU Commission rather than the Member States have the authority to enter into a bilateral broadcasting agreement. The FCC must wait here for a review by the new USTR of the General Agreement on Trade in Services (GATS), the TTIP and TiSA.

So in the meantime Chairman Pai is correct to focus on using his weedwhacker to remove the regulatory underbrush rather than wading into the unfamiliar territory of foreign broadcasting and Commissioner O'Rielly is wise to focus on weeding out bloated subsidies. Neither should prematurely advise Secretaries Tillerson and Ross and USTR Lighthizer how to conduct international trade negotiations related to Team Telecom. We are confident that Commissioner Clyburn will play a wise and constructive role in reminding her colleagues and others that Africa requires up to \$1 trillion in investment for electricity to turn the televisions on. Both the United States and Africa would likely benefit from a bilateral AGOA- and GSP-related opportunity for U.S. broadcasters to bring broadcasting to Africa based on the uniquely successful 20th Century U.S. broadcasting model.

In the meantime, progress can be made to extend broadcasting services over existing broadband facilities. President Trump supported U.S. oversight of ICANN during the campaign. A Trump campaign spokesman told viewers on C-Span that the new FCC focus would be on promoting the U.S. Information Age comparative advantage. These campaign promises can and should be kept. Towards that end, while I appreciate this initial opportunity to make updates to permit thoughtful oppositions to my petition, it is long past time for the FCC to place my petition for reconsideration in the Open Internet proceeding on public notice. In the meantime, the FCC placement of my petition for reconsideration in the Federal Register provides *prima facie* evidence that I have satisfied the two prong Freedom of Information Act (FOIA) test concerning government operations and widespread dissemination. In addition, NTIA FOIA 17-15 and USITC 17-17 demonstrate that there are information gaps in the current CFIUS approach. See Huawei Marine To Deploy New Submarine Cable System in Greenland, International Circuit, Communications Today, December 2016 and Niall O'Dowd, President Xi Jinping's Visit to Ireland Then China's Deep Connection With the Shannon Region, Irish Central, March 9, 2012. The FCC should learn from rather than repeat the mistakes of history. Prior to 1500 three-quarters of all books were in Latin, but in 1487 Pope Innocent VIII required prior church approval of books before publication. Nevertheless, early English editions of Chaucer's *Canterbury Tales* and Italian editions of Dante's *Divine Comedy*, made clear that efforts to censor books would be untenable and by 1517 Martin Luther was insisting that all Christians be able to read the Bible in their own language. The digital revolution means cost reductions that permit global broadcasting in English and in one's own language. An Open Internet means that English can be the *lingua franca* of global commerce, but that even languages threatened by extinction, like endangered species, may be saved by advances in technology among people of good will. The FCC must build upon the Magna Carta-era Thames ferry non-discriminatory first come, first served approach that has been incorporated into U.S. common law without

descending into the abyss of the fairness doctrine. A Federal Register notice will help and I request grant of my FTCA, FOIA and Open Internet requests upon receipt.

/s/

William J. Kirsch

Feb. 6, 2017

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REPLY COMMENTS
PART II

My successful proposal during the Chairmanship of Alfred Sikes for the use of waivers to reduce international telex and international message telephone services (IMTS) rates provides a precedent for the FCC grant of waivers for foreign ownership in broadcasting. See Notice of Proposed Rulemaking, Regulation of International Accounting Rates, 5 FCC Record 4948 (1990) and Report & Order, CC Docket 90-337, 6 FCC Record 3552 (1991). See also Keith Bradsher, FCC Acts to cut up to 50% on calls abroad, New York Times, July 17, 1990 at A.1. But consensus adoption of the CCITT/ITU-T of Recommendations D.1 and D.140 was followed by more than half the ITU membership following the British imperial legacy carrier Cable & Wireless v. FCC, 166 F.3d 1224 (1999) in opposing the IMTS reductions that made the dotcom boom and the Internet possible. Now after the adoption of the illiberal International Telecommunications Regulations (Dubai 2012) majority rule approach adopted in the United Arab Emirates at the World Conference on International Telecommunications (WCIT) another Information Age counter-revolution involves the two-thirds illiberal majority that have their sights set on ICANN and U.S. internet names, numbers and protocols. The FCC has failed to keep itself informed about these developments. See, e.g., 47 U.S.C. 211 and 218. The FCC is still governed by the D.C. Circuit Court C&W decision that stated that "[a]lthough the U.S. telecommunications industry has become more competitive, the industry remains non-competitive in much of the rest of the world" so that "foreign carriers with U.S. affiliates can use their monopoly power to distort competition in the United States." The FCC cannot permit crony capitalists efforts to result in Judge Silberman's *Verizon v. FCC* "tragedy of the commons" with regard to the U.S. comparative advantage, national security and public safety. Under CALEA Title II regulation of ICANN is required as the FCC broadband is a successor service to legacy international telegraph, telex and telephone service. See, e.g., Common Carrier Services, 51 Fed. Reg. 4736 (1986).

While online broadcasting services are still at a relatively early stage, it would be premature, at best, to grant unilateral waivers for broadcasting given the even less competitive nature of the international audio-visual marketplace including restrictions on movie distribution in the People's Republic of China that are having an impact on the movies made in Hollywood.

While "China's largest internet company wants to give free internet to Indians," see Manish Singh, Mashable, Feb. 6, 2017, the new Trump Trade Dream Team should be given an opportunity to provide market access in India. India should make long overdue reforms after its failed "non-aligned" pro-Soviet Union policies and if it continues to refuse to reform to begin to close its digital divide with China, then we should focus on welcoming India continuing to send us its best people.

The FCC's approach may be taken as a progressive proposal to address the \$2.5 Saudi Aramco sovereign wealth fund, but the FCC should recognize that additional work, such as that being done at the Carnegie Corporation of New York's Islam Initiative, is necessary before people of good will can bring about a second Islamic Golden Age. While the Carnegie Corporation observes that apart from Mecca the United States represents the most diverse array of Muslims from all over the world, it is for Trump Trade Dream Team to work on initiatives such as free trade in library services that build upon the establishment by Andrew Carnegie of 2,500 public libraries around the world. See "Andrew Carnegie," History. com. The FCC can work with the Saudis to build upon the historical legacy of the Sykes-Picot agreement immortalized in David Lean's classic *Lawrence of Arabia* to provide modern day trilingual (Arabic, French and English) free trade in library services across the Islamic world. This would be vastly wiser and superior to a unilateral U.S. trade concession in broadcasting.

Apart from Mexico in the NAFTA renegotiation among the best opportunities for initial free trade in broadcasting services may be with our allies, Japan, Australia and Germany, in conjunction with the U.S. banking Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) concessions they have made that were necessary, but not sufficient. Progress in Japan and Australia related to SoftBank Sprint's warehousing of spectrum and News Corporation ownership of Fox would be a welcome pivot back to Asia. But trade concessions are long overdue with regard to Germany's T Mobile and the EU must commit to a soft Brexit essential to transatlantic commerce.

The best opportunity for broadcasting is with the United Kingdom. The British are first in the queue for a bilateral free trade agreement under a magnificent Queen Elizabeth II as the third of three great Queens reigning over England for a remarkable one-third of the last half millenium. Nothing could be better for the Anglophone world, as well as the Open Internet, than a bilateral free trade agreement that recognizes the gender accomplishments associated with the patron, Elizabeth I, of the greatest writer in English history, William Shakespeare, as we celebrate a modern British Prime Minister who not only has the heart of a Prime Minister, but of a Prime Minister of the United Kingdom! After the soft Brexit legally required by EU trade commitments to the United States, and a U.S.-UK FTA, USTR can use AGOA and GSP to provide for Anglophone broadcasting, telecom and internet agreements with Africa that build upon the priceless nurturing of Her Majesty of the Commonwealth and provide for a new and iconic Elizabethan Information Age. The FCC can't hurry Team Telecom.

/s/

William J. Kirsch

Feb. 17, 2017

This document is the European Union's proposal for services, investment and e-commerce text. It was tabled for discussion with the US in the negotiating round of 12 -17 July 2015 and made public on 31 July 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

DISCLAIMER: The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.

Transatlantic Trade and Investment Partnership

TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

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CHAPTER III - CROSS BORDER SUPPLY OF SERVICES

Article 3-1

Scope

1. This Chapter applies to measures of the Parties affecting the cross-border supply of services in all services sectors.
2. The provisions of this Chapter shall not apply to audio-visual services.
3. Subsidies shall be dealt with by Chapter [X (on competition and state aid)] and the provisions of this chapter shall not apply to subsidies granted by the Parties.
4. Government procurement shall be dealt with by Chapter [X (on public procurement).] and nothing in this Chapter shall be construed to limit the obligations of the Parties under Chapter X on public procurement or to impose any additional obligation with respect to government procurement.

Article 3-2

Market Access

In sectors or subsectors where market access commitments are undertaken, neither Party shall adopt or maintain with regards to market access through the cross-border supply of services, either on the basis of its entire territory or on the basis of a territorial sub-division, measures that impose:

- (a) limitations on the number of services suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in the terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

Article 3-3

National Treatment¹³

1. Each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less

¹³ For greater certainty, Article 2-3 (National Treatment) shall also be interpreted in accordance with paragraphs 2, 3 and 4 with respect to economic activities performed through establishment.